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ALEXANDER L. STEVAS,
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No. 82-1495

In The

Supreme Court of the United States

October Term, 1982

W. LAWSON KING,

Petitioner,

vs.

MONTGOMERY COUNTY, MARYLAND,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is Petitioner denied due process of law when, prior to Respondent's entry upon Petitioner's property under Respondent's advance-take authority, Petitioner has a full hearing before an impartial judicial tribunal to challenge the authority of Respondent to exercise its advance-take power?

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OPINION DELIVERED BELOW

On January 6, 1983, the Court of Appeals of Maryland filed a per curiam, reported opinion which affirmed the ruling of the Circuit Court for Montgomery County, Maryland. King v. Montgomery County, 453 A.2d 828 (Md. 1983).

STATEMENT OF THE CASE

This case involves a challenge by Petitioner to Respondent's exercise of its advance-take authority under Article III, Section 40A of the Maryland Constitution and Section 49-50 of the Montgomery County Code 1972 (1977 Replacement Volume).

On or about January 11, 1982, Respondent filed with the Circuit Court for Montgomery County, Maryland, a Petition of Advanced Taking and Deposit of Funds to obtain possession of a portion of Petitioner's property needed for Respondent's construction of the Gude Drive Extension. Prior to Respondent's entry upon Petitioner's property for road construction purposes, Respondent filed a Motion to Dismiss Petition and for Declaratory and Injunctive Relief. In said Motion, Petitioner challenged Respondent's exercise of its advance-take authority on three grounds:

1. Petitioner alleged that Respondent had failed to comply with the necessary procedural requirements of Section 49-50 of the Montgomery County Code;

2. Petitioner alleged that the Gude Drive Extension was not a county road and, therefore, Respondent lacked the authority to exercise its advance-take power in this case; and

3. Petitioner alleged that Section 49-50 of the Montgomery County Code was unconstitutional in that it did not provide Petitioner with notice and an opportunity to be heard on the exercise of Respondent's advance-take authority.

Both parties filed additional pleadings and memoranda of law addressing all issues raised by Petitioner. Similarly, oral argument by the parties was conducted before the Montgomery County Circuit Court on all of these issues.

Importantly, Respondent did not enter upon Petitioner's property for construction purposes until the issues raised in Petitioner's Motion to Dismiss were resolved by the Montgomery County Circuit Court.

On March 30, 1982, the Montgomery County Circuit Court, in a twelve-page, written opinion from Judge Philip M. Fairbanks, denied Petitioner's Motion to Dismiss and denied Petitioner's request for an injunction to restrain Respondent from entering upon Petitioner's land to construct the Gude Drive Extension. On the first issue raised by Petitioner in his Motion to Dismiss, Judge Fairbanks concluded that Respondent had complied with all applicable procedural requirements in its exercise of its advance-take authority in this case. On the second issue, Judge Fairbanks, in rejecting Petitioner's contention that the Gude Drive Extension was undertaken solely by and for

the sole benefit of the City of Rockville, Maryland, upheld Respondent's authority to exercise its advance-take power. Finally, on the third issue, Judge Fairbanks declared that Respondent's advance-take process did not violate the due process guarantee of the Fourteenth Amendment of the United States Constitution.

Following briefing and oral argument on all issues raised by Petitioner, the Court of Appeals of Maryland filed a per curiam, reported opinion which affirmed the ruling of the Montgomery County Circuit Court for the reasons stated in Judge Fairbanks' opinion.

SUMMARY OF ARGUMENT

There are no special or important reasons that would warrant review of this case by this Court on a Writ of Certiorari.

In his Petition for Writ of Certiorari, Petitioner seeks this Court's review of the constitutional issue Petitioner previously raised before the Court of Appeals of Maryland and before the Circuit Court for Montgomery County, Maryland. The decisions of both of these courts on this issue were in complete accord with prior decisions of this Court and all other federal courts that have addressed this issue. Petitioner cites no case law (federal or state) demonstrating (or even suggesting) a conflict among the courts on this question.

This Court had an opportunity to reverse its prior decisions establishing the due process standard applicable to the advance-take process but did not do so. Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex.) (per curiam, three-judge court), aff'd mem., 419 U.S. 1042 (1974).

This case is not an appropriate one for this Court to examine the constitutional issue raised by Petitioner. Before the Circuit Court for Montgomery County, Maryland, Petitioner was given a full hearing by an impartial judicial tribunal on his challenge to Respondent's authority to exercise its advance-take power in this case.

ARGUMENT

I. The Decision Of The Court Of Appeals On The Constitutional Issue Raised By Petitioner In His Petition For Writ Of Certiorari Was Consistent With Prior Decisions Of This Court And Other Federal Courts Addressing This Issue.

This Court has previously addressed the question of the due process standard applicable to a condemnation authority's exercise of its

advance-take power, the constitutional issue now raised by Petitioner in his Petition for Writ of Certiorari. United States v. Welch, 327 U.S. 546 (1946) (Reed, J. concurring); North Laramie Land Company v. Hoffman, 268 U.S. 276 (1925); Georgia v. City of Chattanooga, 264 U.S. 472 (1924); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); Joslin Company v. Providence, 262 U.S. 668 (1923); Bragg v. Weaver, 251 U.S. 57 (1919); Sears v. City of Akron, 246 U.S. 242 (1918); Sweet v. Rechel, 159 U.S. 380 (1895). The decision of the Court of Appeals of Maryland on this issue was consistent with these prior decisions. King v. Montgomery County, Maryland, 453 A.2d 828 (Md. 1983).

The decision of the Court of Appeals of Maryland was also in complete accord with prior decisions from other federal courts which have addressed the same constitutional question. Government of the Virgin Islands v. 19.623 Acres

of Land, 536 F.2d 566 (3rd Cir. 1976); Joiner v. City of Dallas, 380 F.Supp. 754 (N.D. Tex.) (per curiam, three-judge court), aff'd mem., 419 U.S. 1042 (1974).

This case lacks any special or important reason that would warrant review by this Court on a Writ of Certiorari because there is no conflict among federal or state courts that have addressed the due process standard applicable to the exercise of a condemnation authority's advance-take power. Petitioner has cited no case law (federal or state) demonstrating (or even suggesting) a conflict among the courts on this issue.

II. This Court Had An Opportunity To Reverse Its Prior Decisions On This Constitutional Issue But Did Not Do So.

Contrary to Petitioner's contention, this Court had an opportunity to reverse the above-cited decisions establishing the due process standard applicable to the exercise of a

condemnation authority's advance-take power. This Court did not do so. Instead, in the Joiner case, this Court affirmed by memorandum opinion a decision of a federal district court (three-judge panel) which upheld the constitutionality of Texas' eminent domain statutes, which included an advance-take procedure. In so doing, this federal district court applied the due process standard previously established by this Court. The Joiner court specifically refused to apply the "modern" standard of due process developed through Mitchell v. W.T.Grant Company, 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corporation, 405 U.S. 538 (1972); Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969).

III. Petitioner Was Given The Hearing Before An Impartial Judicial Tribunal Which He Claims Is Denied To Him By Respondent's Advance-Take Process.

Factually, this case is not an appropriate one for this Court to examine the constitutional issue raised by Petitioner in his Petition for Writ of Certiorari. Before the Circuit Court for Montgomery County, Maryland, Petitioner was given the hearing which he now claims is denied to him by Respondent's advance-take process. Before that Court, Petitioner had a full opportunity to brief and argue his challenge to the authority of Respondent to exercise its advance-take power in this case. Factually, Petitioner's due process issue is not present in this case.

CONCLUSION

There are no special or important reasons that would warrant review of this case

by this Court. For the above-stated reasons, this Court should deny Petitioner's Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 1983, three (3) copies of the foregoing Brief In Opposition were mailed, via first class mail, postage prepaid, to R. Edwin Brown, Esquire, Brown and Sturm, P. O. Box 511, Rockville, Maryland 20850.

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